

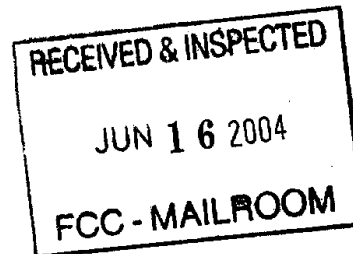


June 11, 2004

105 Carnegie Center
Princeton, NJ 08540-6215
(609) 734-3700- phone
(609) 734-3830 facsimile

VIA OVERNIGHT DELIVERY

W. Kenneth Ferree
Chief
FCC Media Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554



Re: Access to and Distribution of Video Programming Content.

Dear Mr. Ferree:

On behalf of RCN Corporation, and its affiliates and subsidiaries (collectively, "RCN"), we would like to share with you RCN's views on the debate regarding access to and distribution of video programming content, and the significant impact these issues have on competition in the cable television industry. We appreciate your interest in this important topic, and your attention to RCN's perspective as one of the nation's preeminent providers of competitive video programming services to consumers.

RCN is the nation's first and largest broadband "overbuilder" – a company that provides wireline cable television, telephone, and high-speed Internet access services primarily to residential customers. RCN offers its services over its own fiber optic network, in competition with the incumbent cable and telephone companies. RCN is a multi-channel video programming distributor ("MVPD") that provides competitive, bundled telecommunications services in the Boston, New York, Philadelphia, LeHigh Valley, Washington, D.C., Chicago, San Francisco and Los Angeles markets. As such, RCN is on the front lines of cable competition, and is in an ongoing battle over access to video programming and the terms and conditions governing such access.¹

The FCC has determined that "access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace. An MVPD's ability to provide service that is competitive with an incumbent cable operator is significantly

¹ RCN currently is undergoing reorganization under the protection of Chapter 11 of the bankruptcy laws, to restructure its balance sheet and enhance the company's competitive viability going forward. Articles in the Washington Post on Saturday, May 22, 2004, and the Wall Street Journal on Wednesday, May 27, 2004, highlight the competitive difficulties that RCN, and companies like it, currently face.

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harmful if denied access to 'must have' vertically integrated programming for which there are no good substitutes."² The FCC also has concluded that "where permitted, vertically integrated programmers will use foreclosure of programming to provide a competitive edge to their affiliated cable operators."³ It is in this context that RCN and its fellow broadband service providers have struggled to obtain access to critical programming – in particular, local news and sports. Although RCN currently has negotiated agreements for access to the majority of programming controlled by the incumbent cable operators in RCN's markets, obtaining such programming has been extremely challenging. In many cases, the incumbents only grant access in the face of regulatory scrutiny, typically in conjunction with the incumbent's need for regulatory approval of a pending merger or acquisition.

The uncertainty surrounding the difficulty in obtaining essential programming continues to be one of the most significant barriers to RCN's ability to effectively compete in the cable marketplace. The cable incumbents and their trade association, the National Cable and Telecommunications Association ("NCTA"), historically have deflected attention from the problem of competitors' access to programming owned or controlled by the cable incumbents, typically by reversing their anti-competitive stance when under pressure from regulators. This result, however, comes only after RCN has been forced to expend an unreasonable and significant amount of time, finances and resources to secure the programming – time, finances and resources that, in the interest of competition and consumers, would have been far better spent on RCN's network, services, and subscribers. Examples of this problem have been presented in numerous comments to the FCC and in materials provided to the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights by RCN and the Broadband Service Providers Association.

Despite the incumbents' last minute reversals that have afforded RCN access to most of the programming it seeks to carry, the problem remains, and is exacerbated by the so-called "terrestrial loophole" in the FCC's rules that permits cable incumbents to withhold entirely programming that is not delivered by satellite feed. The terrestrial loophole in the FCC's program access rules enables cable incumbents to exploit their monopoly control over programming in major markets, notwithstanding the clear intent of Congress in the Cable Act to foreclose such anti-competitive behavior. Only when the terrestrial loophole has been closed will competitive providers be assured of access to programming owned or controlled by the large cable incumbents, and only then will all consumers be assured of an increase in choices, with respect to both service providers and programming.

On Friday, May 21, 2004, the Wall Street Journal published a letter from David C. McCourt, Chairman and CEO of RCN Corporation, which provided an insightful look at the stark reality and detrimental consequences of the lack of competition in the cable industry,

² Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order, 17 FCC Rcd 12124, ¶59 (2002).

³ *Id.*

including the lack of consumer choice.⁴ That Mr. McCourt's letter drew a swift and harsh response from James Robbins, President and CEO of Cox Communications, speaking for the incumbent side of the industry,⁵ is merely indicative of the incumbents' steadfast refusal to yield anything – even rhetorical points – to their competitors. Moreover, Mr. Robbins' thesis in rebuttal to Mr. McCourt is simply incorrect: wire-to-wire competition is failing not because the business plan is flawed, but because the barriers to market entry are too high. Where wire-to-wire competition was able to take root before the massive economic downturn in the telecommunications sector, competition is flourishing, prices to consumers for video programming are lower than in other markets, and service quality has typically dramatically improved, as documented below. In its established markets, RCN's customer penetration rates generally meet or exceed its business plan. This is so, because consumer demand for the high quality, high value bundled service packages offered by RCN and other overbuilder competitors are highly desirable to the consumers. Unfortunately, only a small minority of consumers are lucky enough to be in one of the few markets where overbuilder competition exists. And, so long as barriers to entry such as program access obstacles persist, it is unlikely that overbuilder competition will spread much beyond its current footprint.

There is little doubt that cable competition benefits consumers, especially when provided by wireline competitors like RCN. Indeed, RCN is precisely the type of competitor Congress envisioned when it opened the broadband market to competition through passage of the Telecommunications Act of 1996. For example, in its Sixth Annual Report on the status of competition in the video programming industry the FCC described in detail the benefits that consumers realized when RCN entered the Somerville, Massachusetts market.⁶ Before RCN even started providing services in Somerville, the incumbent cable operator had begun offering a free subscription to *TV Guide*, an additional channel, and lower rates for equipment rentals in response to RCN's advertising campaign.⁷ Moreover, soon after RCN commenced providing

⁴ One example that Mr. McCourt provides is the way in which cable consumers receive and pay for their programming. On this point, RCN would like to clarify that it is in favor of increased programming choices for consumers, but does not support a government-mandated a la carte requirement for distributors such as RCN. Instead, regulators should consider an a la carte policy for content providers that would address the problems associated with existing tying arrangements. Under such a policy, the content provider would be prohibited from forcing distributors, such as RCN, to purchase bundled programming and from dictating the way in which consumers receive such programming. RCN could then obtain reasonable access to essential programming that would allow it to offer consumers its own unique programming packages.

⁵ See Letter from James O. Robbins, President and CEO, Cox Communications, Inc., published in the Wall Street Journal on June 1, 2004.

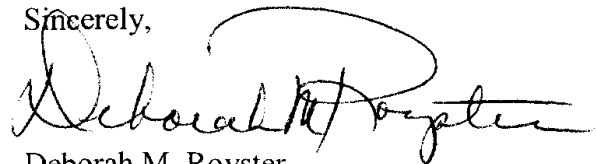
⁶ Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Sixth Annual Report*, 15 FCC Rcd. 978, paras. 227-233 (2000).

⁷ *Id.*

services in Somerville, the incumbent offered consumers more choices in programming packages, reduced rates for certain premium services, and did not raise its cable rates for Somerville, although 82 other Massachusetts communities, which lacked competition, saw a 10% price increase in their standard cable service.⁸ Other studies reach a similar conclusion on the benefits of wireline competition in the cable industry. In a recent study on cable rates, the U.S. Government Accounting Office noted that "[c]ompetition from wire-based and DBS operators leads to lower cable rates and improved quality and service among cable operators. Competition from a wire-based provider . . . is limited to very few markets. However, in those markets where this competition is present, cable rates are significantly lower -- by about 15 percent -- than cable rates in similar markets without wire-based competition."⁹

For these reasons, regulators should focus on policies and regulations that are aimed at addressing the problems associated with the access to programming. Solving these problems is imperative for RCN and other competitive broadband providers, in order to promote and facilitate competition in the cable market, which, in turn, will lead to the desired results of lower cable rates, diversity in programming packages, and increased customer choice. Moreover, it is imperative that regulators act swiftly and decisively to ensure that the withholding or tying of critical content not stand as a barrier to the success or further deployment of state-of-the-art services to America's consumers.

Sincerely,



Deborah M. Royster
Senior Vice President, General Counsel, and
Corporate Secretary
RCN Corporation

cc: Libby Beatty, NATOA
John Goodman, BSPA
BSPA Executive Committee

⁸ *Id.*

⁹ U.S. Government Accounting Office (GAO), *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (October 2003), at 3.